

# **WEST VIRGINIA LEGISLATURE**

**2019 REGULAR SESSION**

**Enrolled**

**Committee Substitute**

**for**

**Senate Bill 352**

SENATORS WELD AND CLINE, *original sponsors*

[Passed March 9, 2019; in effect from passage]



1 AN ACT to amend and reenact §15A-3-14 of the Code of West Virginia, 1931, as amended; and  
2 to amend said code by adding thereto a new section, designated §15A-3-14a, all relating  
3 to the Division of Corrections and Rehabilitation acquiring and disposing of services,  
4 goods, and commodities; clarifying notice requirements; allowing the division to require  
5 surety; expanding acceptable forms of surety; allowing the division to utilize best value  
6 procurement; providing exception; establishing procedure for best value procurement;  
7 allowing for direct award procurement; establishing procedure for direct award  
8 procurement; allowing the division to run criminal background checks, financial  
9 background checks, licensing background checks, and credit checks to determine  
10 eligibility for award of contract; enumerating grounds upon which division shall disqualify  
11 vendors from being awarded a contract or having contract renewed; limiting disclosure  
12 under Freedom of Information Act of records obtained in response to solicitations for bids  
13 and records relating to solicitations for, or purchases of, items related to safe and secure  
14 running of any facility under jurisdiction of commissioner of division; creating special  
15 revenue fund; and providing for methods of disposition of surplus property owned by the  
16 division.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 3. DIVISION OF CORRECTIONS AND REHABILITATION.**

**§15A-3-14. Exempt from Purchasing Division; purchasing procedures.**

1 (a) The provisions established in §5A-3-1 *et seq.* of this code do not apply to the division  
2 or any institution under the control of the division.

3 (b) When the cost under any contract or agreement entered into by the division, other than  
4 compensation for personal services, involves an expenditure of more than \$2,500 and less than  
5 \$25,000, the division shall solicit at least three bids, if possible, from vendors and make a written  
6 contract, or agreement, with the lowest responsible bidder. When the cost under any contract or  
7 agreement entered into by the division, other than compensation for personal services, involves

8 an expenditure of \$25,000 or more, the division shall make a written contract with the lowest  
9 responsive, responsible bidder after public notice is published, which notice shall state the general  
10 character of the work and general character of the materials to be furnished, the place where  
11 plans and specifications therefor may be examined, and the time and place of receiving bids. The  
12 notice may be published by an advertising medium the division deems advisable. The division  
13 may also solicit sealed bids by sending requests by mail or electronic transmission to prospective  
14 vendors. But a contract for lease of a correctional facility is not subject to the foregoing  
15 requirements and the division may enter into the contract for lease pursuant to negotiation upon  
16 the terms and conditions and for the period as it finds to be reasonable and proper under the  
17 circumstances and in the best interests of proper operation or efficient acquisition or construction  
18 of the projects. The division may reject any and all bids. A bond with good and sufficient surety,  
19 approved by the division, may be required by the division. The good and sufficient surety may be  
20 in the form of a bid bond, performance bond, payment bond, maintenance bond, labor and  
21 materials bond, or any other type of surety deemed necessary by the division.

22 (c) The division may use best value procurement to enter into a contract when the  
23 commissioner determines in writing that it is advantageous to the state.

24 (1) A solicitation for bids under best value procurement shall be made in the same manner  
25 as provided in this section.

26 (2) Best value procurement awards shall be based on criteria set forth in the solicitation  
27 and information contained in the proposals submitted in response to the solicitation. Those criteria  
28 include, but are not limited to, price and the total cost of acquiring, operating, maintaining, and  
29 supporting a commodity or service over its projected lifetime, as well as technical criteria. The  
30 technical criteria may include, but are not limited to, the evaluated technical merit of the bidder's  
31 bid or proposal, the bidder's past performance, the degree to which a proposal exceeds other  
32 proposals in technical merit, the utility of any novel or unrequested items in the proposal, and the

33 evaluated probability of performing the requirements stated in the solicitation on time, with high  
34 quality, and in a manner that accomplishes the business objectives set forth in the solicitation.

35 (3) The award must be made to the highest scoring responsive and responsible bidder  
36 whose bid is determined, in writing, to be most advantageous to the state, taking into  
37 consideration all evaluation factors set forth in the best value solicitation.

38 (4) The division may not use best value procurement to enter into government construction  
39 contracts, including, but not limited to, those set forth in §5-22-1 *et seq.* of this code.

40 (d)(1) The division may make a direct award of a contract without competitive bidding if:

41 (A) The commissioner shall make a written determination that the direct award is in the  
42 best interest of the state;

43 (B) The division documents in writing that competition is not available because there is no  
44 other source for the commodity or service, or that no other source would be willing or able to  
45 replace the existing source without a detrimental effect on the division, the existence of a  
46 detrimental effect being determined by the commissioner in his or her sole discretion;

47 (C) The division publicly advertises a notice of intent to make a direct award without  
48 competition in the state's official bid notification system, as well as any other public advertisement  
49 that the division deems appropriate, for no less than 10 business days; and

50 (D) No other vendor expresses an interest in providing the commodity or service in  
51 question.

52 (2) If a vendor expresses an interest in providing the commodity or service described in  
53 the notice of intent to make a direct award, then the division must convert the direct award to a  
54 competitive bid, unless the commissioner determines that the interest expressed by a vendor is  
55 unreasonable. The competitive bid may, at the discretion of the commissioner, be either a request  
56 for quotation or request for proposal.

57 (3) The notice of intent to make a direct award shall contain the following information:

58 (A) A description of the commodity or service for which a direct award will be made;

59 (B) A time period by which delivery must be made or performance must occur;

60 (C) The price that will be paid for the commodity or service;

61 (D) Any limitations that a competing vendor would need to satisfy;

62 (E) An invitation to all vendors interested in providing the commodity or service to make  
63 that interest known; and

64 (F) Contact information for the commissioner or his or her designee, and instructions to  
65 submit a statement of interest to the commissioner or his or her designee.

66 (e) The commissioner, or division, shall not award a contract or renew a contract to any  
67 vendor or prospective vendor when the vendor or prospective vendor, or a related party to the  
68 vendor or prospective vendor, is a debtor and:

69 (1) The debt owed is an amount greater than \$1,000 in the aggregate; or

70 (2) The debtor is in employer default.

71 (f) The division has the authority to run criminal background checks, financial background  
72 checks, a licensing check, and a credit check, and any vendor, or any and all principals in a  
73 company or corporation, must submit to said checks to be eligible to be awarded a contract for  
74 the division. The commissioner, or division, shall not award a contract to a vendor if any of the  
75 following are present:

76 (1) Conviction of an offense involving fraud or a felony offense in connection with obtaining  
77 or attempting to obtain a public contract or subcontract;

78 (2) Conviction of any federal or state antitrust statute relating to the submission of offers;

79 (3) Conviction of an offense involving embezzlement, theft, forgery, bribery, falsification or  
80 destruction of records, making false statements, or receiving stolen property in connection with  
81 the performance of a contract;

82 (4) Conviction of a felony offense demonstrating a lack of business integrity or business  
83 honesty that affects the present responsibility of the vendor or subcontractor;

84 (5) Default on obligations owed to the state, including, but not limited to, obligations owed  
85 to the Workers' Compensation Fund, as defined in §23-2C-1 *et seq.* of this code, and obligations  
86 under the West Virginia Unemployment Compensation Act and West Virginia state tax and  
87 revenue laws. For purposes of this subsection, a vendor is in default when, after due notice, the  
88 vendor fails to submit a required payment, interest thereon, or penalty, and has not entered into  
89 a repayment agreement with the appropriate agency of the state or has entered into a repayment  
90 agreement but does not remain in compliance with its obligations under the repayment  
91 agreement. In the case of a vendor granted protection by order of a federal bankruptcy court or a  
92 vendor granted an exemption under any rule of the Bureau of Employment Programs or the  
93 Insurance Commission, the commissioner may award a contract: *Provided*, That in no event may  
94 the contract be awarded to any vendor who has not paid all current state obligations for at least  
95 the four most recent calendar quarters, excluding the current calendar quarter, or with respect to  
96 any vendor who is in default on a repayment agreement with an agency of the state;

97 (6) The vendor is not in good standing with a licensing board, in that the vendor is not  
98 licensed when licensure is required by the law of this state, or the vendor has been found to be  
99 in violation of an applicable licensing law after notice, opportunity to be heard, and other due  
100 process required by law;

101 (7) The vendor is an active and knowing participant in dividing or planning procurements  
102 to circumvent the \$25,000 threshold requiring a sealed bid or otherwise avoid the use of a sealed  
103 bid; or

104 (8) Violation of the terms of public contracts or subcontracts for:

105 (A) Willful failure to substantially perform in accordance with the terms of one or more  
106 public contracts;

107 (B) Performance in violation of standards established by law or generally accepted  
108 standards of the trade or profession amounting to intentionally deficient or grossly negligent  
109 performance on one or more public contracts;

110 (C) Use of substandard materials on one or more public contracts or defects in  
111 construction in one or more public construction projects amounting to intentionally deficient or  
112 grossly negligent performance, even if discovery of the defect is subsequent to acceptance of a  
113 construction project and expiration of any warranty thereunder;

114 (D) A repeated pattern or practice of failure to perform so serious and compelling as to  
115 justify disqualification; or

116 (E) Any other cause of a serious and compelling nature amounting to knowing and willful  
117 misconduct of the vendor that demonstrates a wanton indifference to the interests of the public  
118 and that caused, or that had a substantial likelihood of causing, serious harm to the public.

119 (g) Unless the context clearly requires a different meaning, for the purposes of this section,  
120 the term:

121 (1) "Debt" means any assessment, premium, penalty, fine, tax, or other amount of money  
122 owed to the state or any of its political subdivisions because of a judgment, fine, permit violation,  
123 license assessment, amounts owed to the Workers' Compensation Fund as defined in §23-2C-1  
124 *et seq.* of this code, penalty, or other assessment or surcharge presently delinquent or due and  
125 required to be paid to the state or any of its political subdivisions, including any interest or  
126 additional penalties accrued thereon;

127 (2) "Debtor" means any individual, corporation, partnership, association, limited liability  
128 company, or any other form of business association owing a debt to the state or any of its political  
129 subdivisions, and includes any person or entity that is in employer default;

130 (3) "Employer default" means having an outstanding balance or liability to the Old Fund or  
131 to the Uninsured Employers' Fund or being in policy default, as defined in §23-2C-2 of this code,  
132 failure to maintain mandatory workers' compensation coverage, or failure to fully meet its  
133 obligations as a workers' compensation self-insured employer. An employer is not in employer  
134 default if it has entered into a repayment agreement with the Insurance Commissioner and  
135 remains in compliance with the obligations under the repayment agreement;

136 (4) "Political subdivision" means any county commission; municipality; county board of  
137 education; any instrumentality established by a county or municipality; any separate corporation  
138 or instrumentality established by one or more counties or municipalities, as permitted by law; or  
139 any public body charged by law with the performance of a government function and whose  
140 jurisdiction is coextensive with one or more counties or municipalities; and

141 (5) "Related party" means a party, whether an individual, corporation, partnership,  
142 association, limited liability company, or any other form of business association or other entity  
143 whatever, related to any vendor by blood, marriage, ownership, or contract through which the  
144 party has a relationship of ownership or other interest with the vendor so that the party will actually,  
145 or by effect, receive or control a portion of the benefit, profit, or other consideration from  
146 performance of a vendor contract with the party receiving an amount that meets or exceeds five  
147 percent of the total contract amount.

148 (h) The prohibitions of subdivision (5), subsection (f) of this section do not apply where a  
149 vendor has contested any tax administered pursuant to chapter 11 of this code, amount owed to  
150 the Workers' Compensation Fund as defined in §23-2C-1 *et seq.* of this code, permit fee, or  
151 environmental fee or assessment and the matter has not become final, or where the vendor has  
152 entered into a payment plan or agreement and the vendor is not in default of any of the provisions  
153 of such plan or agreement.

154 (i) The division may disqualify a vendor if award to the vendor would jeopardize the safe,  
155 secure, and orderly operations of the division.

156 (j) All bids, contract proposals, or contracts with the state or any of its political subdivisions  
157 submitted or approved under the provisions of this code shall include an affidavit that the vendor,  
158 prospective vendor, or a related party to the vendor or prospective vendor is not in employer  
159 default and does not owe any debt in an amount in excess of \$1,000 or, if a debt is owed, that the  
160 provisions of subsection (h) of this section apply.

161 (k) If the division has to make a purchase under emergency conditions, or an emergency  
162 situation, that jeopardizes the safe, secure, and orderly operations of the division, as deemed by  
163 the commissioner, and approved by the Secretary of the Department of Military Affairs and Public  
164 Safety, subsection (b) of this section shall not apply.

165 (l) The commissioner may enter into agreements with medical schools and institutions of  
166 higher education in this state to develop standards for appropriate and innovative medical  
167 programming and care for inmates: *Provided*, That the division will follow the procedures set forth  
168 in subsection (b) of this section for delivery of regular and normal medical care within the facilities.

169 (m) Notwithstanding any other provision of this code to the contrary, any records obtained  
170 in response to solicitations for bids from the division shall not be subject to disclosure pursuant to  
171 §29B-1-1 *et seq.* of this code, until and unless the time frame for submission of bids has closed:  
172 *Provided*, That once bids close, the records may be exempt from disclosure pursuant to §29B-1-  
173 4 of this code. Any record relating to any solicitation for, or purchase of, any item related to the  
174 safe and secure running of any facility under the jurisdiction of the Commissioner of the Division  
175 of Corrections and Rehabilitation is not subject to disclosure pursuant to §29B-1-1 *et seq.* of this  
176 code.

**§15A-3-14a. Creation of special fund for surplus property revenue; disposal of surplus property.**

1 (a) There is hereby created a special revenue fund in the State Treasury known as the  
2 Division of Corrections and Rehabilitation Surplus Property Fund. Moneys from this fund shall be  
3 used for facility maintenance and repair.

4 (b) The commissioner is hereby authorized to dispose of surplus state property owned by  
5 the division in the following manner:

6 (1) Transferring the particular commodities or expendable commodities between  
7 departments;

8           (2) Selling the commodities to county commissions, county boards of education,  
9 municipalities, public service districts, county building commissions, airport authorities, parks and  
10 recreation commissions, nonprofit domestic corporations qualified as tax exempt under Section  
11 501(c)(3) of the Internal Revenue Code of 1986, as amended, or volunteer fire departments in  
12 this state when the volunteer fire departments have been held exempt from taxation under Section  
13 501(c) of the Internal Revenue Code;

14           (3) Trading in the commodities as a part payment on the purchase of new commodities;

15           (4) Cannibalizing the commodities pursuant to procedures established under subsection  
16 (g) of this section;

17           (5) Properly disposing of the commodities as waste;

18           (6) Selling the commodities to the general public at the posted price or to the highest  
19 bidder by means of public auctions or sealed bids, after having first advertised the time, terms,  
20 and place of the sale as a Class II legal advertisement in compliance with the provisions of §59-  
21 3-1 *et seq.* of this code. The publication area for the publication is the county in which the sale is  
22 to be conducted. The sale may also be advertised in other advertising media that the division  
23 considers advisable. The division may sell to the highest bidder or to any one or more of the  
24 highest bidders, if there is more than one, or, if the best interest of the state will be served, reject  
25 all bids; or

26           (7) Selling the commodities to the highest bidder by means of an internet auction site  
27 approved by the division, as set forth in an emergency rule promulgated pursuant to the provisions  
28 of §29A-3-15 of this code.

29           (c) Upon the sale to the general public or transfer of commodities or expendable  
30 commodities between departments, or upon the sale of commodities or expendable commodities  
31 to an eligible organization, the division shall set the price to be paid by the receiving eligible  
32 organization, with due consideration given to current market prices.

33 (d) The division may sell expendable, obsolete, or unused motor vehicles owned by the  
34 division to an eligible organization, other than volunteer fire departments. In addition, the division  
35 may sell expendable, obsolete, or unused motor vehicles owned by the division with a gross  
36 weight in excess of 4,000 pounds to an eligible volunteer fire department. The division, with due  
37 consideration given to current market prices, shall set the price to be paid by the receiving eligible  
38 organization for motor vehicles sold pursuant to this provision: *Provided*, That the sale price of  
39 any motor vehicle sold to an eligible organization may not be less than the “average loan” value,  
40 as published in the most recent available eastern edition of the National Automobile Dealers  
41 Association (NADA) Official Used Car Guide, if the value is available, unless the fair market value  
42 of the vehicle is less than the NADA “average loan” value, in which case the vehicle may be sold  
43 for less than the “average loan” value. The fair market value shall be based on a thorough  
44 inspection of the vehicle by an employee of the division who shall consider the mileage of the  
45 vehicle and the condition of the body, engine, and tires as indicators of its fair market value. If no  
46 fair market value is available, the division shall set the price to be paid by the receiving eligible  
47 organization with due consideration given to current market prices. The duly authorized  
48 representative of the eligible organization, for whom the motor vehicle or other similar surplus  
49 equipment is purchased or otherwise obtained, shall cause ownership and proper title to the motor  
50 vehicle to be vested only in the official name of the authorized governing body for whom the  
51 purchase or transfer was made. The ownership or title, or both, shall remain in the possession of  
52 that governing body and be nontransferable for a period of not less than one year from the date  
53 of the purchase or transfer. Resale or transfer of ownership of the motor vehicle or equipment  
54 prior to an elapsed period of one year may be made only by reason of certified unserviceability.

55 (e) The division shall report to the Legislative Auditor, semiannually, all sales of  
56 commodities or expendable commodities made during the preceding six months to eligible  
57 organizations. The report shall include a description of the commodities sold, the price paid by  
58 the eligible organization that received the commodities, and to whom each commodity was sold.

59 (f) The proceeds of the sales or transfers shall be deposited in the State Treasury in the  
60 special revenue account created in subsection (a) of this section.

61 (g)(1) For purposes of this section, "cannibalization" means the removal of parts from one  
62 commodity to use in the creation or repair of another commodity.

63 (2)(A) If the division intends to cannibalize an asset, the division shall document: (i) The  
64 commodity identification number; (ii) the commodity's acquisition date; (iii) the commodity's  
65 acquisition cost; (iv) a description of the commodity; (v) whether the commodity is operable and,  
66 if so, how well it operates; (vi) how the division will dispose of the remaining parts of the  
67 commodity; and (vii) who will cannibalize the commodity and how the person is qualified to remove  
68 and reinstall the parts.

69 (B) If the division has immediate plans to use the cannibalized parts, the division shall  
70 document for the commodity or commodities that will receive the cannibalized part or parts: (i)  
71 The commodity identification number; (ii) the commodity's acquisition date; (iii) the commodity's  
72 acquisition cost; (iv) a description of the commodity; (v) whether the commodity is operable; (vi)  
73 whether the part restores the commodity to an operable condition; and (vii) the cost of the parts  
74 and labor to restore the commodity to an operable condition without cannibalization.

75 (C) If the division intends to retain the cannibalized parts for future use, it shall document  
76 that said parts have been retained for future use.

77 (D) The division shall develop procedures for the disposal of the residual components of  
78 cannibalized property.

79 (3) Whenever the division disposes of a commodity in a landfill, or by other lawful means  
80 of waste disposal, the division shall notate this on the inventory for the commodity and shall  
81 document the reasons why it was disposed of in such manner.



The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....  
*Chairman, Senate Committee*

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*Chairman, House Committee*

Originated in the Senate.

In effect from passage.

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*Clerk of the Senate*

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*Clerk of the House of Delegates*

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*President of the Senate*

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*Speaker of the House of Delegates*

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The within ..... this the.....  
Day of ....., 2019.

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*Governor*